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AUG 28 2003

August 28, 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**BY HAND**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**RE:** *WorldCom, Cox, and AT&T v. Verizon*  
CC Docket Nos. 00-218, 00-249, and 00-251

Dear Ms. Dortch:

Enclosed for filing please find four copies of Verizon Virginia Inc.'s ("Verizon VA") Application for Review in the above-referenced arbitration proceedings. In addition, I am providing a copy to be stamped and returned.

Please don't hesitate to call if you have any questions.

Very truly yours,



Samir C. Jain  
Attorney for Verizon Virginia Inc.

cc Service List

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

RECEIVED

AUG 28 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
Petition of WorldCom, Inc. Pursuant	)	
to Section 252(e)(5) of the	)	CC Docket No. 00-218
Communications Act for Expedited	)	
Preemption of the Jurisdiction of the	)	
Virginia State Corporation Commission	)	
Regarding Interconnection Disputes	)	
with Verizon Virginia Inc., and for	)	
Expedited Arbitration	)	
	)	
In the Matter of	)	CC Docket No. 00-249
Petition of Cox Virginia Telecom, Inc., etc.	)	
	)	
In the Matter of	)	CC Docket No. 00-251
Petition of AT&T Communications of	)	
Virginia Inc , etc.	)	

**VERIZON VIRGINIA INC.'S APPLICATION FOR REVIEW**

Pursuant to Rule 1115 of the Commission's rules, Verizon Virginia, Inc. ("Verizon VA") submits this Application for Review of the Bureau's decision to refuse to consider directly relevant evidence submitted by Verizon VA to update the record in this case. The Bureau rejected Verizon VA's proffer of evidence that would have supplemented and updated the record in four key respects in light of significant legal and factual developments since the record had closed.

*First*, the Commission's recently released *Triennial Review Order* clarified that the cost of capital used to determine TELRIC rates should reflect two types of risk, the risks of a fully competitive market and any unique added risk associated with services that might be provided using unbundled elements. *Triennial Review Order* ¶¶ 680, 683. Verizon VA's proffer included evidence not only of the tremendous growth in competition in the Virginia telecommunications market, but also included evidence on the appropriate adjustments to reflect both the risks

inherent in a competitive market and the added unique risks associated with competitors' use of unbundled elements to provide service.

*Second*, experience since the initial cost studies submitted in this case demonstrates that wholesale uncollectible rates are substantially higher than the proxy (based on traditional access and similar services) used in the studies. And in February of this year the Commission itself recognized that the uncollectible rate going forward will be many times the rate used in the initial studies. Verizon VA's proffer included evidence directly relevant to determining an appropriate uncollectibles rate and ensuring that the UNE rates set in this proceeding are not materially understated.

*Third*, the *Triennial Review Order* makes clear that any technology assumed for TELRIC purposes must be "currently available," and may not be technologies that theoretically "may be available in the future but are not currently available." *Triennial Review Order* ¶ 670 n.2020. In addition, the Supreme Court affirmed since the record closed that the "currently available" technology limitation on UNE rates provides one of the key safeguards that prevents the TELRIC regime from "squench[ing] competition in facilities." *Verizon*, 535 U.S. at 505. Moreover, Verizon VA's proffer demonstrated that since the record closed in this proceeding, AT&T itself has admitted, contrary to its position in this case, that it is not practicable to use IDLC to unbundle stand-alone loops, and that there is no magical GR-303 solution to this problem.

*Fourth*, since the record here closed, the Supreme Court has made clear that UNE rates are subject to challenge at the time they are set on the basis that they fail to provide just compensation. *See Verizon*, 535 U.S. at 524. The evidence Verizon VA proffered provides an objective benchmark that demonstrates that the CLECs' extremely low rate proposals would not

come close to providing Verizon VA with adequate compensation to cover its costs of providing UNEs in Virginia.

Verizon initially filed a motion asking the Bureau to provide all parties a limited opportunity to supplement the record in light of significant legal and factual developments since the record had closed. When the Bureau did not respond to the motion, Verizon VA filed a formal Proffer of Supplemental Evidence (attached hereto as Attachment A) that included some of the most significant evidence Verizon VA expected it would submit if its motion were granted. The Bureau indicated in an email message sent nearly four months ago that it was rejecting Verizon's motion and would not consider Verizon VA's proffered evidence, but the Bureau still has not issued the "forthcoming written order" it promised with respect to its ruling. The Commission should intervene now to ensure that the Bureau adopts rates that are based on up-to-date information

Failure to consider such additional evidence and instead to rely knowingly on flawed or outdated information would be reversible error. And it obviously would serve no party's interest, including the Commission's, for the Bureau to set rates here that are facially wrong from the outset: this would only add to the detrimental effect on investment and growth of facilities-based competition that the TELRIC rules are already having today. Economists and analysts alike have recognized that the TELRIC methodology creates disincentives to investment in facilities and disrupts the development of facilities-based competition, and the Commission has indicated it intends to initiate a proceeding to reform those rules. If the Bureau adopts UNE rates based on a record that is legally and factually insufficient and out-of-date, it will not only perpetuate, but aggravate, such distortions. Absent a stay, the rates adopted by the Bureau would be in effect when the Bureau issues its final order. Thus, the rates' deleterious impact in Virginia

will be immediate. Further, the Bureau's decision may be looked to as a source for guidance by other state commissions in their own UNE decisions, and could thus shape rates around the country for years to come. The effects of the Bureau's order, therefore, could be difficult, if not impossible, to unwind. It is now more urgent than ever that the proffered evidence be admitted so that the UNE rates adopted are lawful and do not further distort carriers' economic incentives.

## **DISCUSSION**

### **I. The Bureau's Decision Would Result in the Exclusion of Critical, Directly Relevant Evidence.**

The evidence before the Bureau is stale and outdated. The Bureau concluded its hearings over a year and a half ago. Those hearings, in turn, were based on cost studies that the parties submitted in July 2001. And those studies were based primarily on data from 1998 and 1999. In the meantime, the market, legal and regulatory landscape have undergone dramatic changes that are not reflected in the record. In light of these developments, Verizon VA sought, first through a motion to permit the parties a limited opportunity to supplement the record in this proceeding<sup>1/</sup> and then through a proffer of supplemental evidence,<sup>2/</sup> to provide the Bureau with updated evidence so that the record was complete and the resulting order was not out-of-date and based on incomplete evidence as soon as it was issued. The Bureau's refusal to consider this information would result in the exclusion of evidence directly relevant to some of the key decisions the Bureau must make in its order.

In particular, as set forth in detail in Verizon VA's Proffer of Supplemental Evidence, the record in this proceeding must be supplemented and brought up to date in four key respects.

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<sup>1/</sup> Verizon VA's Motion to Permit Parties to Supplement the Record (November 22, 2002).

<sup>2/</sup> Verizon Virginia, Inc.'s Proffer of Supplemental Evidence (April 15, 2003) (hereinafter *Verizon VA Proffer*)

First, Verizon VA should be permitted to provide supplemental evidence relevant to the appropriate cost of capital assumptions that should be adopted in this case. The Commission has recognized that TELRIC studies must include cost of capital assumptions that fully reflect both competitive market and regulatory risks.<sup>3/</sup> One of the significant legal developments since the record closed in this proceeding is the Commission's recently released *Triennial Review Order*, where the Commission clarified that the cost of capital should reflect two types of risk, "the risks of a competitive market . . . in which there is facilities-based competition" and "any unique risks (above and beyond th[ose] competitive risks . . . ) associated with new services that might be provided over certain types of facilities." *Triennial Review Order* ¶¶ 680, 683. The Commission also explicitly rejected AT&T's argument in the *Triennial Review*, and before the Bureau here, that the cost of capital should reflect "only the actual competitive risks the incumbent LEC currently faces." *Triennial Review Order* ¶ 681. The Commission similarly recognized that depreciation should be based on "economic lives" and that depreciation therefore "should reflect any factors that would cause a decline in asset values, such as competition or advances in technology." *Id.* ¶ 685. By definition, outdated regulatorily prescribed lives cannot meet this standard

The record needs to be updated and supplemented with evidence concerning these relevant competitive and regulatory risks. Over the two and a half years since this case began, a critical factual development that is not reflected in the record to date has been the tremendous growth in competition in the Virginia telecommunications market. The evidence Verizon proffered showed that, as of January 2003, the number of lines being served by competing carriers in the state was approaching one million, with roughly 800,000 of those lines served in

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<sup>3/</sup> Reply Brief for Petitioners United States and the FCC, *Verizon Communications, Inc., et al. v. FCC, et al.* at 12 n.8 (July 2001).

whole or in part using facilities that these carriers have deployed themselves (including in all cases their own local switches) And intermodal competition has continued to grow from cable, wireless, Internet telephony providers, and e-mail and instant messaging. *Verizon VA Proffer* at 9-12. The result of these developments is that, for the first time ever, both the number of lines and switched access minutes of use served by Verizon VA have declined for several consecutive years. This is a significant departure from the positive growth assumptions underlying all the cost studies initially filed in this proceeding. In addition, if Verizon were permitted to update the record, it would demonstrate that after Verizon VA's UNE rates were ratcheted down in order to satisfy this Commission's "benchmarking" standard as part of the section 271 approval process, CLECs have shifted their focus to using UNE-P in Virginia, a shift that is deterring telecommunications investment.

Verizon VA should be permitted to introduce evidence concerning these marketplace developments because they are directly relevant to many of the input assumptions that the Bureau is in the process of deciding. For example, this evidence demonstrates additional risks to which Verizon VA is subject, above and beyond the competitive market risks that must be assumed in setting a TELRIC cost of capital, and therefore further supports Verizon VA's proposed cost of capital. It also demonstrates that AT&T/WorldCom's cost of capital proposal, which is based on a monopoly environment, must be rejected. Similarly, this evidence shows why depreciation lives should be based on economic GAAP lives, as Verizon VA proposed, and not on outmoded regulatory lives that do not account for the continued growth in competition. Indeed, although AT&T's proposed depreciation lives in this case were based on the assumption of a monopoly environment, AT&T conceded, in its comments on the *Triennial Review*, that "if a competitive environment makes it more likely that an incumbent's capital will be devalued (say

by entry or by more rapid technical progress), TELRIC depreciation will reflect this ” See *Triennial Review Order* ¶ 685 n. 2054 (citing AT&T ex parte).

The record also must be updated to include Verizon VA’s evidence with respect to the appropriate means of accounting for the pertinent regulatory risks, which the Commission acknowledged before the Supreme Court must be reflected,<sup>4/</sup> and, in particular, to reflect the unique risks of providing services over UNEs. Verizon VA witnesses Dr. Howard Shelanski and Dr. James Vander Weide explained in their testimony during this case that the cost of capital should take into account the regulatory risks of the UNE regime and of TELRIC pricing in particular, and noted that Verizon VA’s initial proposal would have to be revised upward to take these risks into account.<sup>5/</sup> Specifically, the risks of providing UNEs are similar to the risks inherent in cancelable operating leases, where the lessees may opt to cancel and the lessor bears the risk that the asset will sit idle or that rates may decrease. This is why, for example, the daily cost to rent a car is greater than the cost per day of a long-term car lease. This same risk is inherent in the provision of UNEs, because CLECs are free to terminate their use of a particular element or of UNEs generally at any time, and instead move to alternative facilities or technologies. And even if CLECs do continue to use the incumbent’s UNEs, they nonetheless are able essentially to “cancel” their existing UNE leases and renew them at the lower rates that are set every few years based on new hypothetical network assumptions.

While Verizon VA had not calculated the value of this added risk at the time the initial cost studies were completed, Verizon VA has now done so using a well-accepted methodology

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<sup>4/</sup> Reply Brief for Petitioners United States and the FCC, *Verizon Communications, Inc., et al v FCC, et al.* at 12 n.8 (July 2001)

<sup>5/</sup> VZ-VA Ex. 101 at 13-14; VZ-VA Ex. 104 at 5, 41; VZ-VA Ex. 112 at 30-31; VZ-VA Ex. 118 at 11, 21.



commonly used to value similar options in financial markets. These calculations demonstrate that the cost of capital used to set UNE prices in this case should include a 5.41% risk premium to reflect the risks Verizon VA faces under TELRIC that this Commission has recognized must be accounted for in UNE rates. *Triennial Review Order* ¶¶680-681, 683; *Verizon VA Proffer* at 14-17.

*Second*, Verizon VA should be permitted to introduce evidence showing that, as the Commission and AT&T have recognized and experience has demonstrated, the rate of uncollectible accounts is much higher than suggested by the evidence submitted in Verizon VA's initial studies in this case.<sup>67</sup> At the time Verizon VA completed its cost studies, it still had limited experience collecting wholesale charges from CLECs and therefore used as a proxy the historical uncollectible rate of 0.56% for traditional access and similar services. More recent experience demonstrates that wholesale uncollectible rates are substantially higher than the access proxy. In 2001 and 2002, for example, the wholesale uncollectible rate averaged 11% across the Verizon East footprint, and more than 25% in Virginia alone, even without including uncollectible charges as a result of the WorldCom bankruptcy. *Verizon VA Proffer* at 12-14. In fact, the Commission itself has recognized that the uncollectible rate going forward will be many times the historical access proxy rates (on the order of 4% to 5%) even for more stable lines of business.<sup>71</sup> In view of these facts, Verizon VA's supplemental evidence is directly relevant to

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<sup>67</sup> See Policy Statement, *In the Matter of Verizon Petition for Emergency Declaratory and Other Relief*, 17 FCC Rcd 26884, 26889 ¶ 9 (2002) ("the Commission's ratemaking policies for incumbent LECs also account for interstate uncollectibles and provide for their recovery through interstate access charges"); see also Letter from James W. Cicconi, General Counsel and Executive Vice President, Law & Government Affairs, AT&T Corp. to Honorable Michael Powell, Chairman, Attachment at pp. 1-2 (July 26, 2002).

<sup>71</sup> Wireline Competition Bureau Staff Study of Alternative Contribution Methodologies, CC Docket Nos. 96-45, *et al.* at 5-8 (rel. Feb. 25, 2003) ("Staff Study") (assuming uncollectible rates of 4-5%).

determining an appropriate uncollectibles rate and ensuring that the UNE rates set in this proceeding are not materially understated.

*Third*, the record needs to be updated to reflect that both the Commission and the Supreme Court have made important clarifications regarding the scope of TELRIC. The Commission, in its *Triennial Review Order*, has made clear that any technology assumed for TELRIC purposes must be “currently available” -- i.e., actually deployed for the stated purpose in at least *some* carrier’s network, and may not be technologies that theoretically “may be available in the future but are not currently available.”<sup>8/</sup> *Triennial Review Order* ¶ 670 n.2020. Another key legal determination since the record closed on this point was the Supreme Court’s affirmation that the “currently available” technology limitation on UNE rates provides one of the key safeguards that prevents the TELRIC regime from “squelch[ing] competition in facilities.” *Verizon*, 535 U.S. at 505.

The Bureau accordingly should reject claims that it may base UNE rates on the false assumption that Verizon VA can provide unbundled stand-alone loops using integrated digital loop carrier technology equipped with so-called GR-303 interfaces when this flies in the face of technical and market reality. As the evidence Verizon VA proffered demonstrated, since the record closed in this proceeding, AT&T itself has admitted in its *Triennial Review* filing and elsewhere that it is not practicable to use IDLC to unbundle stand-alone loops, and that there is no magical GR-303 solution to this problem. *Verizon VA Proffer* at 19.

Further, Verizon VA’s supplemental evidence demonstrates that no GR-303 switching technology should be assumed for TELRIC purposes because it is rapidly becoming outmoded and is not a forward-looking technology in the real world: Verizon VA has not deployed any

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<sup>8/</sup> See 47 C.F.R. § 51.505(b)(1).

GR-303 compatible switches in Virginia, and switch manufacturers are not even investing in research and development of that technology.

*Fourth*, the record should be supplemented with the evidence Verizon VA sought to submit concerning its historical investments and associated operating expenses. The Supreme Court has made clear since the record in this proceeding closed that UNE rates are subject to challenge at the time they are set on the basis that they fail to provide just compensation. *See Verizon*, 535 U.S. at 524. The evidence Verizon VA proffered provides an objective benchmark that demonstrates that the CLECs' extremely low rate proposals would not come close to providing Verizon VA with adequate compensation to cover its costs of providing UNEs in Virginia.

In addition, the Commission itself has previously committed it will provide a mechanism to provide adequate compensation if UNE rates do not fully compensate incumbents. First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15873 ¶ 739 (1996). Verizon's evidence quantifies the amount that will have to be made up through an independent mechanism, which is clearly relevant to the Bureau's decision. The law is clear that Verizon VA has a right to provide such evidence, and the agency must consider it. *See Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1176-1179 (D.C. Cir. 1987) (evidence concerning whether rate affords sufficient compensation *must* be considered and failure to do so is reversible error); *Presault v. ICC*, 494 U.S. 1, 11 (1990) (Constitution requires "reasonable, certain, and adequate provision for obtaining compensation at the time of the taking").

## **II. The Commission Should Act Now To Ensure that the Bureau's Order Is Based on a Complete and Updated Record to Avoid Seriously Distorting the Communications Market.**

The Commission must act now to ensure the Bureau's order does not have an immediate and deleterious effect on investment and competition in Virginia and more generally around the country. Absent a stay, the rates the Bureau issues in this case will be effective immediately upon release of the Bureau's order. 47 C.F.R. § 1.102(b)(1). Thus, even if the Commission ultimately reversed the Bureau's refusal to consider Verizon VA's supplemental evidence, Verizon VA would in the interim be subject to unlawful rates that would harm the entire Virginia marketplace. Moreover, these harmful effects would not be restricted to Virginia. Because the Bureau, and ultimately the Commission, will be construing its own TELRIC rules, other state commissions inevitably will look to the Bureau's decision here for guidance in their own UNE pricing proceedings. Even if the Bureau's decision is ultimately corrected on review, other states in the interim may have followed the Bureau's lead, and it therefore could take months, if not years, to correct the effects of the Bureau's errors.

It is widely recognized by both prominent economists and the investment community that the existing TELRIC rules are having a detrimental effect on investment and the development of facilities-based competition. For example, analysts have concluded that, "[f]or all RBOCs, UNEs are priced below cash operating cost, and radically below total operating cost including depreciation and amortization,"<sup>9/</sup> and that, as a result of the application of TELRIC, "[s]ix years following the Act, we are left with virtually no structural incentive for any company to ever build

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<sup>9/</sup> A. Kovacs, et al. Commerce Capital Markets, Inc., *The Status of 271 and UNE-Platform in the Regional Bells' Territories* at 15 (May 1, 2002).

an alternative local network that will compete with local carriers over time.”<sup>10/</sup> Similarly, economists such as Dr. Alfred Kahn have observed that “[t]he advocacy of [TELRIC] is based on the assumption that this is the level to which effective competition would drive prices. That view is mistaken.”<sup>11/</sup> At least in part because of such concerns, the Commission itself has indicated that it intends to initiate a proceeding to reform its current TELRIC pricing rules.

Permitting the Bureau to issue new rates based on the flawed TELRIC rules *and* an out-of-date record that lacks critical, directly relevant evidence would only exacerbate the harm from the existing TELRIC rules. Such rates unquestionably would fail to send proper pricing signals and therefore only further distort investment decisions and disrupt the development of efficient competition in the Virginia local service market and more generally around the country.

The Commission should act now to prevent these results. There is simply nothing to be gained from having the Bureau issue a decision that is based on incomplete and out-of-date information. This is especially true since, as part of the 271 process, the Commission recently

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<sup>10/</sup> Gregory P. Miller, *et al.*, Fulcrum Global Partners, *Wireline Communications: Thoughts on FCC Order* at 2 (Feb. 25, 2003); *see also* B. Roberts, *et al.*, Dresdner Kleinwort Wasserstein, *UNE-P: The Unprofitable RBOC* at 3 (Aug. 9, 2002) (“[U]nder a more rational local competitive framework, overbuilding might have occurred to a greater extent.”); S.C. Cleland, *et al.*, The Precursor Group, *Telecom/Tech Policy: From the Economic Propeller to Growth Anchor*, at 1 (Oct. 2, 2001) (“[T]he macroeconomic consequences of the FCC’s TELRIC fiat was to devalue three quarters of the Nation’s telecom infrastructure by two-thirds.”); McKinsey & Co. and JP Morgan H&Q, *Broadband 2001, A Comprehensive Analysis of Demand, Supply, Economics, and Industry Dynamics in the U.S. Broadband Market* at 18 (Apr. 2, 2001) (“No company will deploy and scale facilities if it can achieve similar economics immediately by renting network elements from the ILECs – all with little up-front investment.”).

<sup>11/</sup> A. Kahn, *Letting Go: Deregulating the Process of Deregulation* at 91, MSU Public Utilities Papers (1998). *See also* A. Kahn, *Whom the Gods Would Destroy, – Or How Not to Deregulate* 5 (2001) (“Because of the conceptual errors in the FCC’s economic logic, the wide differences produced by its prescribed blank-slate models, consistently lower than the actual incremental cost estimates of the incumbent companies, are simply incredible and cannot be attributed to the natural tendency of regulators to underestimate and regulatees to exaggerate the costs on the basis of which rates are to be set.”).

found that the current Virginia rates are “within the range of rates that a reasonable application of TELRIC principles would produce”<sup>12/</sup> Indeed, in the process of approving Verizon VA’s 271 application, the Virginia rates were already ratcheted down: in order to satisfy the Commission’s so-called benchmarking standard, Verizon VA had to reduce its rates *below* the level found by the Virginia Commission to be TELRIC-compliant. That rate reduction has deterred investment and caused competitors increasingly to rely on UNE-P.<sup>13/</sup> If the Bureau now were to set similar or even lower rates based on an outdated record, it would make matters even worse. Rather than exacerbate those harmful effects by lowering rates even further, there is every reason for the Commission to fix the current low UNE rates and ensure that the new rates are based on updated and accurate information. Thus, the Commission should exercise its authority and require the Bureau to consider Verizon VA’s supplemental evidence prior to issuing any rates.

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<sup>12/</sup> Memorandum Opinion and Order, *Application by Verizon Virginia Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Virginia*, 17 FCC Rcd 21880, 27085 ¶ 89 (2002).

<sup>13/</sup> For example, one CLEC has told investors that its “UNE-P-based business model allows us to avoid significant capital investments in network facilities.” See Z-Tel, 2001 Annual Report at ii (“Z-Tel was formed around UNE-P.”). Similarly, other CLECs have assured the markets that they “can now lease the necessary elements of the Bell network – without the need for costly network infrastructure, which allows us to earn attractive gross margins” and that they are “deploying very little capital” to provide UNE-P service. Talk America, 2001 Annual Report at 7; Wayne Huyard, Chief Operating Officer, MCI, *Using UNE-P To Develop a Strong and Profitable Local Presence*, Goldman-Sachs Telecom Issues Conference, New York, NY (May 7, 2002), see also Talk America, Form 10-K/A at 6 (SEC filed Apr. 12, 2002) (Talk America “believes that UNE-P currently provides it with a cost-effective means of adding local service to its existing long distance product offerings.”). Indeed, a cottage industry of consultants now advertises that they can help companies “become a UNE-P CLEC” in order to take advantage of the “50% to 70% Net Profit Available” in an environment where “[n]o equipment investment is required” See American Discount Telecom, “50% to 70% Net Profit Available to Competitive Telephone Companies,” available at <http://a-adt.com> (visited June 5, 2003); see also “The U S Supreme Court Wants CLEC’s To Make More Money With UNE-P! You Don’t Need Resale Anymore!,” available at <http://a-adt.com/une-p-clec.html> (visited June 5, 2003).

### III. The Commission Has Ample Authority to Direct the Bureau to Consider Verizon VA's Supplemental Evidence.

The Commission clearly has authority to review the Bureau's decision to refuse to accept Verizon VA's evidence. Rule 1.115 provides that "[a]ny person aggrieved by *any action* taken pursuant to delegated authority may file an application requesting review of that action by the Commission." 47 C.F.R. § 1.115(a) (emphasis added). Indeed, Rule 1.102 specifically anticipates the filing of "an application for review of a[n] . . . interlocutory action" taken on delegated authority, such as the Bureau's order here.<sup>14/</sup> *Id.* § 1.102(b)(3). While such review normally follows a formal written order, the Bureau has never issued any such order, notwithstanding its promise that such an order would be "forthcoming" more than three months ago.<sup>15/</sup> Verizon VA should not at this point be required to continue to wait for the formal order before seeking review because there is an increasing likelihood that the Bureau will not issue a separate written order concerning Verizon VA's evidentiary motion and instead will incorporate its decision on Verizon's proffer into the Bureau's overall cost decision. As discussed in more detail above, however, it is critical that the Commission reverse the Bureau's refusal to consider Verizon VA's supplemental evidence *before* the Bureau orders new UNE rates.

It is clear that the Bureau's decision is in error and that the Commission therefore has full authority under its rules to reverse it. *See, e.g.,* 47 C.F.R. § 1.1115(b)(2)(v) ("[p]rejudicial procedural error" is grounds for application for review). As discussed above, Verizon VA's proffered evidence is critical and directly relevant to this proceeding, particularly in light of

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<sup>14/</sup> Alternatively, the Commission has ample authority to rescind the Bureau's authority to make the specific determination whether to consider Verizon VA's proffered evidence, and make that determination itself. The Commission has full discretion to "at any time amend, modify, or rescind any . . . rule or order" delegating its functions to a Bureau. 47 C.F.R. § 0.201(d).

<sup>15/</sup> Email from Tamara Preiss, Division Chief, Pricing Policy Division, Wireline Competition Bureau, to M. Keffer *et al.* (May 1, 2003).

marketplace and legal developments since the record in this case closed, and thus the Bureau's failure to consider these developments and instead to rely on flawed or outdated information is reversible error. *See, e.g., United Mine Workers of Am. v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989) (failure to supplement the record may raise serious doubts "about whether the agency chose properly from the various alternatives open to it"); *see also Radio-Television News Dir. Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) ("The FCC retains discretion to . . . reopen the record, to ensure that it fully accounts for relevant factual and legal developments."). Indeed, the courts have held that agency decisions are subject to reversal and remand for failure to consider relevant supervening events and evidence. *See, e.g., Atchison, T. & S.F. Ry. v. United States*, 284 U.S. 248 (1932) (remanding agency decision to reopen evidentiary proceedings because of supervening economic changes); *American Comm. for Prot. of Foreign Born v. Subversive Activities Control Bd.*, 380 U.S. 503, 504-05 (1965) (remanding agency decision because "the record should be brought up to date to take account of supervening events").

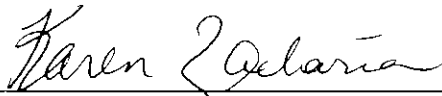


## CONCLUSION

For the foregoing reasons, the Commission should grant Verizon VA's application for review and require the Bureau to consider Verizon VA's Proffer of Supplemental Evidence submitted on April 15, 2003 in this proceeding.

Respectfully submitted,

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Dated: August 28, 2003

CERTIFICATE OF SERVICE

I do hereby certify that true and accurate copies of the foregoing Verizon Virginia Inc.'s Application for Review were served by FedEx this 28th day of August, 2003, to:

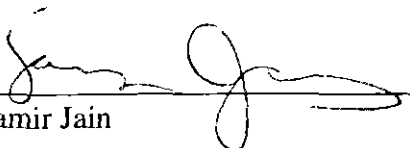
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